

## Book Review: The Twilight of the Supreme Court, By Edward S. Corwin

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## BOOK REVIEWS

*The Twilight of the Supreme Court*, By Edward S. Corwin. Yale University Press, New Haven, 1934. One Volume.

The American Legion has been posting on billboards throughout the country a declaration of its purpose to uphold and defend the constitution. The poster shows a large company of men in uniform marching behind Columbia as she unfolds before them a scroll of paper, the Constitution. The "lawman"<sup>1</sup> looks at this picture and feels perplexed. He wonders if he knows what it is those men have undertaken to defend. He can read the printed words on the scroll. He should be able to read them with the eyes of understanding because he knows something about constitutional law. But could he explain to the men who are marching what he understands by the doctrine of judicial supremacy? And would the men in the picture be so concerned about defending and upholding the constitution, as it is, if they could understand the lawman's explanation?

Professor Corwin in his little book has not pretended to be writing for the uninitiated. But he has written briefly and excellently about this doctrine of judicial supremacy, and about the constitution as it has been affected by industrial development in the United States. The book is small, but it is complete, and so up-to-date, to use a popular phrase, that every lawyer, student and judge should have it. Whether the average well-informed person outside the profession can use it as a shortcut to a practical understanding of the Constitution is problematical. And it is difficult for a lawman to venture a suggestion about that. He has, perhaps, forgotten how he used to think before he learned about the mysteries of the law.

Professor Corwin does not apologize for, nor does he rationalize about, the Court's powers of judicial review. It is a fact that the Court has exercised such powers to affect acts of state legislatures on more or less frequent occasions, and at intervals more infrequent, it has exercised these powers to affect acts of Congress. The author is careful to point out that, under the due process clause of the Fourteenth Amendment, the Court has continued to build upon a scheme which the appellate courts in the several states had been advancing to support their own powers of judicial review where there were no literal due process clauses in their own state constitutions. He shows how these state courts had purported to protect "vested rights" against too much legislation, how they had found it necessary to compromise with the legislatures through the recognition of the police power, and how they had kept to themselves the power to make the classification of "too much" or "proper" regulation through legislation. He shows that the Court began to use the due process clause of the Fourteenth Amendment to protect expanding national business enterprises from too much local regulation.

It is a fact, which Professor Corwin emphasizes, that industrial activity in the United States has known no state boundaries. The state is not the industrial unit. And the author argues from that, as many others have done, that regulation of industrial activity in this country can only be effective when it is nation wide, which in turn will require planning by the national legislature and administration through federal agencies. His thesis is that the Court has it within its power to do as it pleases about regulatory enactments of Congress, that is, to do as it chooses and to stay within the limits of the theories of previous decisions. His prediction is that Congress shall persist in its attempts to regulate industrial activity, that economic necessity will demand it, and that the Court

<sup>1</sup> I borrow this word from Professor Edward S. Robinson of Yale University. See his article, *Law—An Unscientific Science* (1934) 44 Yale L. J. 235.

will eventually, if not immediately, give way. He recognizes, of course, that effective regulation can be worked out only through administrative agencies, and it may be mentioned here, that the recent decision of the Court in the petroleum case has done little, if anything, to suggest that the author's prediction will not be supported by future events.

It is interesting to get Professor Corwin's ideas about the lawmaking powers of the Court. He points out that the Court is in no sense a third house of the legislature, that, in the field of "constitutional law," at least, it is in a position to check, but is in no position to initiate legislation. But even this veto power over all legislation, state as well as national, may not be enough to permit the Court to play any considerable part in the shaping of the nation's future industrial life. In his last chapter, the author points out that the Court has never attempted to check the spending powers which Congress, often at the instance of the executive, has chosen to exercise. Congress has recently appropriated large sums of money to support federal agencies through which the federal government has become the greatest creditor in the world. Government "business" may become so predominant in the industrial field that legislation regulating private business enterprise will be unnecessary. Perhaps Professor Corwin had this last chapter in mind when he called his book, "The Twilight of the Supreme Court."

There is so much that is suggestive and speculative in this chapter that one hesitates to criticise it. It is difficult to anticipate all the probable consequences of the federal government's spending operations. It is well to point out, however, that regulation of industrial activity is not the only function of Congress, and it is by no means the only function of the several state legislatures. Should Professor Corwin's predictions about industrial activity be supported by future events, there may still be some occasions when the Court will have the opportunity to exercise its powers to review legislation.

The lawman should be realistic when he examines the cases on constitutional law. That is particularly true when he considers those cases in which the Court has explained its reactions to regulatory legislation of one kind or another. He cannot help but see that the exercise of this power to check legislative activity is a matter which lies entirely within the discretion of the men on the bench. There is no higher law which automatically instructs them. They have in fact, assumed to exercise this power, and they shall very likely continue to do so, as each one's conscience, his understanding of social demands, his ideas about the traditions of the Court, and his prejudices direct him. All of which does not mean that the judges ought not have such power, nor that the Constitution should be amended, if necessary, to deprive them of it.

The author has not purported to defend the doctrine of judicial supremacy. He feels undoubtedly that the Court will in the future have less occasion to exercise its powers. Perhaps, as a matter of policy, the Court should assert itself to interfere with legislative activity less frequently. It may be conceded, too, that the decisions in these constitutional regulatory cases ought not be considered as precedents in the sense that decisions in ordinary civil suits in the state courts are so considered. Unwise or unpopular decisions in ordinary lawsuits can be changed by subsequent acts of the legislatures. In the absence of express legislation the particular court has set a standard which will serve until the legislature fixes another one. In these constitutional cases the legislature, state or national, is powerless if the Court interferes. One mistaken idea of policy ought not cripple the legislature indefinitely. But the power of judicial review is the sole check

against restrictive action by a popular majority, and sometimes it is well that there be just such a check.

The functions of government are necessarily increasing. Private enterprise, private industry, must be subjected to more and more regulatory legislation. Regulation through administrative boards is the only effective device for supervision. The idea of vested rights must not be permitted to excuse exploitation of natural resources and classes of people by any particular group of persons in the state. As a matter of policy the Court, perhaps, should choose to permit legislatures, state as well as national, to enact and enforce more legislation affecting other interests even than industrial activity. The Court's decisions in these cases must be subjected to careful criticisms based upon the critics' understandings of the matters of policy involved. The Court must not be permitted to hide behind worn-out maxims about their applying and interpreting the laws of the land. But sometimes it will not be wrong "in principle," in the minds of the critics, for example, when the Court chooses to interfere with the enforcement of some act of a legislature, particularly a state legislature, but conceivably an act of Congress itself, which legislation does seriously affect the private individual's privilege to criticise, to speak freely, to believe as he chooses. The power should be there to be exercised when necessary. The chance for safety is worth the risk of mistake.

Most lawmen are ready to concede that the presence of this power of judicial review in the Supreme Court is an historical accident. But the device is a useful one. It means that there is a tremendous responsibility placed upon the men on the bench. It means that the judges must be statesmen, not merely lawmen. The man on the street, the men in the billboard picture, might not be so sure of their allegiance to the Constitution if they knew what the powers are that five men on the bench can exercise in unison. The Constitution, in the words of the present Chief Justice, is what the judges say it is.<sup>2</sup> They are not omniscient. But they are as impartial as human beings can be. A lot of what passes for constitutional law is comparable to Blackstone's hocus-pocus, but the traditions of the profession are a serious check upon arbitrary decisions. Many, perhaps most, of the understanding lawmen believe that the "system" is a good one, and are willing to let a part of the future, at least, rest upon the doctrine of judicial supremacy.

VERNON X. MILLER.

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*Theft, Law and Society*, By Jerome Hall, The Benjamin Research Fellow, Harvard Law School. 1935. One Volume, pp. xxxv-360. Little, Brown, and Company, Boston, Massachusetts.

Professor Hall has contributed a most noteworthy monograph on the law of Theft. Professor K. N. Llewellyn of Columbia Law School wrote the introduction. This book will undoubtedly have a great influence on the course of legislation in the years to come.

Hall's thesis is that the law of theft grew in answer to changing social needs as fiction after fiction was used to extend the scope of existing laws or limit the operation of existing laws; and further, that modern society must recast its laws of theft because they no longer answer our needs.

The subject matter of the book is interesting to lawyer, criminologist and sociologist alike. Beginning with the famous Carriers Case of 1473 Hall carries forward the historical development of the law of larceny. The Carriers Case

<sup>2</sup> See the author's "salutation" on page xxvii of the book under review.